IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

No. 92-1941

UNITED STATES OF AMERICA,

Petitioner,

v.

JERRY W. CARLTON,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Pursuant to Rule 37.4 of the rules of this Court, the Washington Legal Foundation; United States Senators Pete Domenici, Larry E. Craig, John McCain, Slade Gorton, Bob Smith, Trent Lott, Conrad Burns, Kay Bailey Hutchison, Connie Mack, Dan Coats, Jesse Helms, Robert F. Bennett, William V. Roth, Jr., Malcolm Wallop, Dirk Kempthorne, Strom Thurmond, Paul D. Coverdell, Christopher S. Bond, Orrin Hatch, Alfonse M. D'Amato, Ted Stevens, Don Nickles; U.S. Representatives Newt Gingrich, Chris Cox, Gerald Solomon, Dana Rohrabacher, Robert K. Dornan, Deborah Pryce, Jack Kingston, Bill Baker, Peter T. King, John Boehner, Steve Buyer, Jim Bunning, Bob Walker, Joe Knollenberg, Cass Ballenger, Mel Hancock, Rod Grams, Tom Ewing, Tom Bliley, Elton Gallegly; Governor Kirk Fordice of Mississippi; and the Allied Educational Foundation, respectfully move this Court for leave to file the attached brief *amici curiae* in support of the respondent. The petitioner has provided

written consent to the filing of this brief; however, the respondent has refused to provide such consent.

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with over 100,000 members and supporters nationwide who are taxpayers. WLF advocates principles of limited government under the Constitution and promotes the free enterprise system before the courts, regulatory agencies, and the public. WLF has appeared before this Court on numerous occasions as *amicus curiae* over the last 15 years. *See, e.g.*, *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1992); *General Motors Corp. v. Romein*, 112 S. Ct. 1105 (1992). WLF's Legal Studies Division also publishes articles, monographs, and studies on constitutional and regulatory issues.

United States Senators Pete Domenici, *et al.*, and United States Representatives Newt Gingrich, *et al.*, are all duly elected Members of Congress who have a keen interest in the instant case. As Members of Congress, these legislators are responsible for voting on and enacting tax and other legislation affecting the Nation and its citizenry. From time to time, they have been called upon to vote on tax legislation that has retroactive application, and believe that such laws are fundamentally unfair and should be constitutionally sanctioned in only rare cases pursuant to a clear rule of law.

In this regard, many Congressional *amici* have proposed, debated, and/or voted on legislation or other procedures that would limit the passage of retroactive tax laws. *See, e.g.*, 139 Cong. Rec. S14243-59 (daily ed. Oct. 25, 1993); *id.* S14319 (daily ed. Oct. 26, 1993); *id.* S14493-97 (daily ed. Oct. 27, 1993); *id.* S14568-74 (daily ed. Oct. 28, 1993).

Governor Kirk Fordice is the duly elected governor of Mississippi. As governor of a State, he has the

responsibility for determing that State's budget which depends in large measure on federal tax laws and revenues raised at the federal level. Like his Congressional co-*amici*, Governor Fordice also strongly opposes retroactive tax meaures as being fundamentally unfair to the citizens of his state.

The Allied Educational Foundation (AEF) is a non-profit, charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in law and public policy, and has appeared with WLF as *amicus curiae* in numerous cases before this and other courts.

All *amici* believe that their participation in this case will assist the Court in resolving the constitutional question before it. *Amici* bring a broader perspective to this case than do the parties, and present this Court with historical and legal arguments that are either not addressed or not fully discussed by the parties.

Accordingly, movants respectfully request that they be allowed to participate in this case and file the annexed brief *amici curiae* in support of the respondent.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions:

Statutes:

Legislative Material:

Miscellaneous:

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BRIEF FOR *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* Washington Legal Foundation, *et al.*, are set forth in the accompanying motion for leave to file this brief.

STATEMENT OF THE CASE

In the interest of judicial economy, *amici* adopt the statement of the case in respondent's brief. The following summarized facts are pertinent to *amici*'s argument.

In September 1986, the 99th Congress enacted, as part of the "Tax Reform Act of 1986," Pub. L. No. 99-514, 100 Stat. 2085, a provision codified as 26 U.S.C. § 2057 (repealed 1989), which allowed an estate to deduct from the value of the decedent's gross estate half of the

"qualified proceeds" of a "qualified sale" of certain securities to an Employee Stock Ownership Plan ("ESOP"). The 99th Congress adjourned on October 18, 1986, and four days later, on October 22, 1986, the Tax Reform Act of 1986, including section 2057, became law.

In December 1986, in specific reliance on the new "ESOP proceeds deduction" provision contained in section 2057, Jerry W. Carlton, Executor for the Will of Willametta K. Day, purchased 1,500,000 shares of MCI stock for a total of $11,206,000. He promptly sold the shares to the MCI ESOP for $10,575,000. It has been conceded below that but for the section 2057 deduction, Carlton would not have sold the shares at $631,000 below his purchase price.

Later that month, the sale to the MCI ESOP having been irrevocably completed, Carlton filed the estate tax return, deducting $5,287,500 from the gross estate pursuant to the ESOP proceeds deduction contained in section 2057.

In January 1987, the Internal Revenue Service ("IRS") issued an advance version of a notice that it would not recognize an ESOP proceeds deduction under the Tax Reform Act of 1986 under circumstances applicable to Carlton's transaction. In February 1987, a bill was introduced in the newly elected and substantially transformed 100th Congress (the majority in the Senate had shifted from the Republicans to the Democrats) to codify the IRS's restrictions. Finally, in December 1987, an amendment labeled "Congressional Clarification of Estate Tax Deduction for Sales of Employer Securities," was enacted as part of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330, which purported to conform the Tax Reform Act of 1986 to "the original intent of Congress." H.R.Rep. No. 100-391, 100th Cong., 1st Sess., Pt. II, at 1045, *reprinted in* 4 U.S.C.C.A.N. 2313-1, 2313-661 (1987).

After an IRS audit, Carlton paid an estate tax deficiency resulting from, *inter alia*, the retroactive application of the 1987 amendment. Carlton filed a refund claim for that part of the deficiency attributable to the ESOP proceeds deduction. The IRS denied the claim. Carlton then filed an action in federal district court seeking a refund of the taxes attributable to the section 2057 deduction, plus interest, costs and attorneys' fees. The parties below agreed that, if the 1987 amendment could not be retroactively applied consistently with due process, the estate was entitled to the section 2057 deduction as passed in 1986; conversely, if the amendment could be retroactively applied, Carlton could not claim the ESOP proceeds deduction.

Upon cross motions for summary judgment, the district court ruled against Carlton. The Ninth Circuit reversed and remanded on the grounds that "the 1987 amendment . . . , as applied to the transaction at issue here, violated the Due Process Clause of the Fifth Amendment." *Carlton v. United States*, 972 F.2d 1051, 1062 (9th Cir. 1992).

SUMMARY OF ARGUMENT

This case is not about tax evasion; it is about a taxpayer's response to a tax incentive written into law by one Congress, the wisdom of which was reconsidered by a later and substantially recomposed Congress. *Amici* submit that the reconsidered policy may be legitimately applied only to transactions that had not yet been completed. Retroactive legislative changes purporting to affect transactions that have irrevocably closed, as in this case, are pernicious to the concept of ordered liberty. Accordingly, *amici* urge the Court to affirm the Ninth Circuit's holding, and in so doing to clarify the rule of law underlying the current "so harsh and oppressive" due process test for retroactive taxation. It is the experience of *amici*, who include 42 Members of Congress, that the test as currently phrased provides little guidance as to the

outer bounds of Congress' constitutional power to impose retroactive taxes.

To assert that retroactivity is disfavored in the American legal tradition is a gross understatement. Two centuries ago, retroactive laws were considered by most relevant authorities (each discussed *infra*) to be "contrary to the first principles of the social compact," "against natural right," "equally unjust in civil as in criminal cases," "the instrument of some of the grossest acts of tyranny that were ever exercised," "highly injurious," "oppressive," "pernicious," "the height of injustice," "repugnant to common justice," and/or "wrong."

Retroactive taxation is fundamentally antithetical to the "rule of law," which in a free society permits individuals to plan and conform their lives in accordance with ascertainable rules. Retroactive tax law -- by definition not ascertainable in advance -- thus go to the heart of ordered liberty, a fundamental, procedural, civil right of citizens which may be overridden only by the most compelling of legislative purposes.

Amici urge the Court to look closely not only at the due process clauses, but also at the federal *ex post facto* clause, as well as other constitutional and historical indicia, for insight into the meaning of the due process clause upon which the Ninth Circuit's decision rests. *Amici* believe the constitutional text and all available indicia demonstrate that the framers and ratifiers of the Constitution intended to prohibit the type of retroactive tax law at issue in this case.

Accordingly, *amici* urge the Court to adopt the following bright-line constitutional test for retroactive federal taxation: retroactive application of a federal tax law is *per se* unconstitutional as to completed transactions and otherwise presumptively unconstitutional unless necessary to achieve a compelling legislative purpose independent of the desire to raise additional revenues.

ARGUMENT

I. RETROACTIVE TAXES ARE ANTITHETICAL TO THE RULE OF LAW

The Solicitor General argues that the three-part due process formula utilized by the Ninth Circuit,[1] which barred retroactive application of the amended federal tax law because it was "so harsh and oppressive," lacks a foundation in the Constitution. United States Brief at 10, 19-29. But the Solicitor General suggests no meaningful alternative. Essentially, the Solicitor General proposes that the Court eliminate all substance from the current constitutional tests for retroactive federal taxes.

Amici emphatically object to this proposal, which, as explained below, is antithetical to the rule of law and demonstrably repugnant to the intent of the framers and ratifiers of the United States Constitution. *Cf.* W. Blackstone, 1 *Commentaries on the Laws of England* 46 (1765) (retroactive laws are procedurally "more unreasonable" than those of "Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them up upon high pillars, the more effectively to ensnare the people").

A. The Current Retroactivity Test for Federal Taxation is Not a Clear Rule of Law

The foremost problem with retroactive legislation is that it is inimical to the Rule of Law. In *Marbury v. Madison*, Chief Justice John Marshall stressed that "[t]he government of the United States has been emphatically termed a government of laws, and not of men." 5 U.S. (1

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[1] The Ninth Circuit's test looks to: (i) whether the taxpayer had "actual or constructive notice that the tax statute would be retroactively amended," (ii) whether the taxpayer relied "to his detriment on the pre-amendment tax statute," and (iii) whether "such reliance [was] reasonable." *Carlton v. United States*, 972 F.2d at 1059.

Cranch) 137, 163 (1803).[2] Chief Justice Marshall later admonished that "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

When addressing challenges to retroactive civil legislation, modern courts typically resort to a "minimum scrutiny" due process balancing test: "Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches . . . ." *Pension Benefit Guarantee Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). In the tax context, this Court has stated that "we must 'consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.'" *United States v. Hemme*, 476 U.S. 558, 568-69 (1986) (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938)). It is the experience of *amici* that this test provides little guidance as to the outer bounds of Congress' constitutional power to impose retroactive taxes. *See generally* Note, *Has Due Process Struck Out? The Judicial Rubberstamping of Retroactive Economic Laws*, 42 *Duke L.J.* 1069 (March 1993).

If the Solicitor General's position is accepted, this Court's retroactivity caselaw will have evolved into a blatant "rule of men," dependent upon which judge analyzes the case -- as one ancient authority described it,

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[2] *See* S. von Pufendorf, VII *De Jure Naturae et Gentium: Libri Octo* Ch. VI, § 11 (1688) (C.H. & W.A. Oldfather trans. 1934) ("[I]t is clear in what sense is to be taken the statement of the ancient Greek writers on politics and their followers, namely, that the government of a state should be committed to laws rather than to men. For that can have no other fit meaning than this: Care should be taken that those who rule should govern the commonwealth according to the direction of established laws, rather than by their own private and uncircumscribed pleasure." (Citation omitted)).

the legal equivalent of "a mariner's compass without a skipper to direct a ship." Pufendorf, *supra*, Ch. VI, § 11. The dissenting opinion below, applying the same caselaw to the same facts, proves the propensity of the current due process test to breed subjective judgments. *Compare* 972 F.2d at 1061 ("the estate's reliance on the plain language of [the ESOP proceeds deduction] was reasonable") *with* 972 F.2d at 1065 (Norris, J., dissenting) ("I [would not] find his reliance on the statute as originally passed to have been reasonable"). *Amici* implore this Court to clarify the constitutional rule of law for retroactive federal tax legislation, thereby providing both a pilot and stars by which to steer this vessel in the armada of constitutional due process caselaw.

B. The Solicitor General's Reasoning Begs the Question of Retroactivity

All legislation affecting individual rights must be "justified by a rational legislative purpose." *Pension Benefit Guarantee Corp. v. R.A. Gray & Co.*, 467 U.S. at 730. But the "rational legislative purpose" that justifies the prospective application of a law cannot *per se* justify retroactive application of the law. *Id.* ("retroactive legislation does have to meet a burden not faced by legislation that has only future effects"). *A fortiori*, retroactivity cannot be sustained by a legislative purpose that merely describes the retroactivity, *i.e.* that the retroactive law is "designed 'to bring the revenue loss in line with the original estimate and Congressional intent.'" United States Brief at 6, *citing* H.R. Rep. No. 391, 100th Cong., 1st Sess., Pt. II, at 1045.

The Solicitor General confuses "interest," "objective," and "purpose" in the following illogical sequence:

> • "Congress unquestionably has a legitimate *interest* in designing revenue laws to fairly allocate to taxpayers the burdens and benefits of national fiscal policies and to prevent evasion of those laws 'by the vigilant and ingenious.'" United States Brief at 15

(quoting Justice Brandeis' dissent in *Untermyer v. Anderson*, 276 U.S. 440, 450-51 (1928)) (emphasis added);

- "If an unintended loophole is written into an enacted statute, and if Congress acts promptly to correct that error through curative legislation, it cannot be said that retroactive correction of the error lacks a rational relationship to the government's legitimate legislative *objective*." United States Brief at 15 (emphasis added);

- "A curative, retroactive statute rationally designed to accomplish that legitimate *purpose* satisfies the requirements of due process." United States Brief at 15 (emphasis added).

This reasoning has at least three fatal flaws. First, it is premised on the mistaken idea that "tax avoidance" is the same as "tax evasion." Taxpayers in the United States have a legal right to avoid taxes "by means which the law permits." As Judge Learned Hand explained in *Helvering v. Gregory*: "Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes." 69 F.2d 809, 810 (2d Cir. 1934), *aff'd*, 293 U.S. 465, 469 (1935) (Sutherland, J.) ("The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted.") (internal citations omitted). That Congress may have a legitimate interest in preventing tax evasion is wholly irrelevant to this case, which involved legislatively-induced tax avoidance.

Second, and more fundamentally, the Solicitor General's reasoning begs the question of retroactivity in disregard of this Court's admonition that "the retroactive application of the legislation [must] itself [be] justified by

a rational legislative purpose." 467 U.S. at 730.[3] The Solicitor General neither attempts to justify the retroactive application by necessity -- a central component of the Court's reasoning in *Pension Benefit Guarantee Corp.*[4] -- nor disputes that whatever legislative purposes underlie the 1987 amendment could have been achieved through purely prospective legislation.

In effect, the Solicitor General argues that individuals who engage in lawful tax avoidance can later be taxed retroactively for no other reason than to raise more revenues. On this rationale, Congress could, for instance, pass a law to tax inheritances retroactive to 1789, and

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[3] This sequence can also be refuted as a logical fallacy known as the "fallacy of the undistributed middle," whereby the term "legislation" is the undistributed predicate of the following two premises: (A) all constitutional federal tax laws are legislation; and (B) all curative enactments are legislation. From these two premises, the Solicitor General argues that because (C) this law is a curative enactment, therefore (D) this law is a constitutional federal tax law. But the sorites (series of incomplete syllogisms) breaks down because the middle term of the first series (legislation) is undistributed (some legislation is curative and some legislation is constitutional, but not all curative legislation is constitutional -- this is the critical point the Solicitor General's argument misses).

[4] *See Pension Benefit Guarantee Corp.*, 467 U.S. at 730-31 ("One of the primary problems Congress identified under ERISA was that the statute encouraged employer withdrawals from multiemployer plans. And Congress was properly concerned that employers would have an even greater incentive to withdraw if they knew that legislation to impose more burdensome liability on withdrawing employers was being considered. . . . Withdrawals occurring during the legislative process not only would have required that remaining employers increase their contributions to existing pension plans, but also could have ultimately affected the stability of the plans themselves. Congress therefore utilized retroactive application of the statute to prevent employers from taking advantage of a lengthy legislative process and withdrawing while Congress debated necessary revisions in the statute. Indeed, as the amendments progressed through the legislative process, Congress advanced the effective date chosen so that it would encompass only that retroactive time period that Congress believed would be *necessary to accomplish its purposes*." (Emphasis added)).

"justify the retroactive tax on the need to pay the federal debt or to balance the federal budget.

Necessity, however, was the only excuse countenanced at the time of the drafting and ratification of the Constitution for an exception to the general rule against *ex post facto* laws. And legal necessity can never be equated with political expedience. During the constitutional debate, James (later Justice) Iredell made the following observations about *ex post facto* laws being tolerable only in cases of "invincible necessity":

> *Ex post facto* laws may sometimes be convenient, but that they are ever absolutely necessary I shall take the liberty to doubt, till that necessity can be made apparent. Sure I am, they have been the instrument of some of the grossest acts of tyranny that were ever exercised, and have this never failing consequence, to put the minority in the power of a passionate and unprincipled majority, as to the most sacred things, and the plea of necessity is never wanting where it can be of any avail.

Iredell, *Observations on George Mason's Objections to the Federal Constitution*, in *Pamphlets on the Constitution of the United States: Published During Its Discussion by the People 1787-1788* 333, 368 (P. Ford ed. 1888). The Solicitor General has not pled necessity because there was no "invincible necessity" for the retroactive application of the 1987 "Congressional Clarification of Estate Tax Deduction for Sales of Employer Securities."

Finally, the Solicitor General's reasoning casually disregards statutory text in favor of contradictory "legislative intent,"[5] in an effort to forge a justifying

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[5] This case is not like *Helvering v. Gregory*, *supra*, where the Court was interpreting arguably consistent text and legislative intent. 293 U.S. at 469 (focussing on "whether what was done, apart from the tax motive, was the thing which the *statute* intended" (emphasis

legislative purpose *for retroactive legislation* that bears little or no relation to an enumerated grant of power in the Constitution, presumably in this case to the power enumerated in Article I, Section 8, "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1; *see United States v. Butler*, 297 U.S. 1, 64 (1936).

Were the Court to adopt the Solicitor General's logic, Congress could with impunity pass laws that, for instance, permit tax deductions for political contributions, but then retroactively change the law when Members of Congress realize, *post hoc*, that: (1) the contributions overwhelmingly favored anti-incumbency; (2) the revenues lost vastly exceeded expectations; or (3) both. This hypothetical is not far off from what transpired in this case. The fundamental question in the hypothetical, as well as in this case, is this: Where in the Constitution did the States respectively or the people cede such power to Congress? *See Butler*, 297 U.S. at 63 ("The question is not what power the federal government ought to have, but what powers in fact have been given by the people."), *quoted in New York v. United States*, ___ U.S. ___, ___, 112 S. Ct. 2408, 2418 (1992).

The Solicitor General ignores this fundamental question. Instead, he asks this Court to confer upon Congress, in effect, "[a]n unlimited power to make any and everything lawful which the legislature might see fit to call taxation, . . . plainly stated, an unlimited power to

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added)). When, as in this case, alleged "legislative intent" conflicts with the actual words enacted into law, the text controls. *See St. Martin Evangelical Church v. South Dakota*, 451 U.S. 772, 790 (1981) (Stevens, J., concurring) (although legislative history may offer evidence of contrary intent, the statutory text may "simply fail[] to give effect to that intention."); *cf. United States v. Heth*, 3 Cranch 399, 409 (1806) (Johnson, J.) (ambiguous statutory "words should be taken most strongly '*contra proferentum*'"); 3 Cranch at 413 (Paterson, J.) ("[T]he words of a statute, if dubious, ought . . . to be taken most strongly against the law makers.").

plunder the citizen." T. Cooley, "The Power of Taxation," *Constitutional Limitations* 488 (1868). *Amici* believe the American people deserve better -- and are entitled to better under *their* Constitution.

II. THE COURT SHOULD PROVIDE A "BRIGHT LINE" CONSTITUTIONAL TEST FOR RETROACTIVE FEDERAL TAXATION: RETROACTIVE APPLICATION OF A FEDERAL TAX LAW IS *PER SE* UNCONSTITUTIONAL AS TO COMPLETED TRANSACTIONS AND OTHERWISE PRESUMPTIVELY UNCONSTITUTIONAL UNLESS NECESSARY TO ACHIEVE A COMPELLING LEGISLATIVE PURPOSE

Although the Ninth Circuit based its retroactivity decision on the due process clause of the Fifth Amendment, that holding necessarily implicates other textual and structural provisions of the Constitution dealing with retroactivity, foremost of which are the two *ex post facto* clauses.[6] *Amici* urge the Court to look closely at the federal *ex post facto* clause, as well as other constitutional indicia, not only for their own respective merits, but for insight into the meaning of the due process clause upon which the Ninth Circuit's decision rests. *See generally* Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1201 (1991) ("How could we forget that our Constitution is a *single* document, and not a jumble of disconnected clauses -- that it is *a* Constitution we are expounding." (Emphasis in original)).

[6] U.S. Const. art. I, § 9 (Congress) & art. I, § 10 (states).

A. Unlike the State Legislative Power at Issue in *Calder v. Bull*, Congress' Powers Are Limited to Those Enumerated in the U.S. Constitution

It is still axiomatic in the late Twentieth Century that "[t]he Constitution created a Federal Government of limited powers." *New York v. United States*, ___ U.S. at ___, 112 S. Ct. at 2417 (citation omitted). Nevertheless, whether and to what extent Congress has the power to enact retroactive civil laws today does not lend itself to clean constitutional analysis, due to the seminal retroactivity case of *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

In *Calder v. Bull*, the Court is generally understood to have held that the Constitution's two express prohibitions against *ex post facto* laws only apply to criminal legislation. A close reading of Justice Iredell's and Justice Peterson's separate concurring opinions in *Calder v. Bull*, however, suggests that the holding of the Court would have been different had the legislative power at issue been federal instead of state, as explained more fully below. This case presents a clean opportunity for the Court to revisit or distinguish *Calder v. Bull*, and to clarify the constitutional limits on Congress to enact tax legislation retroactively.

Calder v. Bull involved state legislation that "set aside a decree of the court of Probate for Hartford . . . and granted a new hearing." 3 U.S. (3 Dall.) at 386 (Chase, J.). As was the custom at the time, the Supreme Court delivered the opinions of the various justices *seriatim*. Justice Chase opined that the *ex post facto* prohibition applicable to the Connecticut legislature applied only to four types of criminal laws. 3 U.S. (3 Dall.) at 390. Justices Paterson and Iredell, in separate concurring opinions, expounded on the "indefinite nature" of the Connecticut Legislature's powers, which at the time included both legislative *and judicial* functions (in stark contrast to the federal Legislature's powers then and now).

The Court's decision in *Calder v. Bull* is thus not controlling precedent in a case involving the federal legislature, which unlike the legislative power at issue in *Calder v. Bull*, is constrained not only by explicit due process and *ex post facto* restrictions, but also by other organic, structural, and textual constitutional constraints on the exercise of federal legislative power. Accordingly, this case should be treated as both a due process case and a case of first impression under the federal *ex post facto* clause, as construed together with the other indicia of the intent of the framers and ratifiers of the United States Constitution vis-à-vis retroactive federal taxation.

B. The Constitution Restricts the Power of the Federal Government to Enact Retroactive Legislation of the Type in this Case

1. Textual indicia

a. Due process clauses

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V; *cf.* U.S. Const. amend XIV ("No state shall . . . deprive any person of life, liberty, or property, without due process of law."). The Solicitor General concedes that the "guaranty of due process" protects individuals from "unreasonable, arbitrary or capricious" governmental regulation of commercial matters. United States Brief at 12, *quoting Nebbia v. New York*, 291 U.S. 502, 525 (1934). *Amici* believe that retroactive taxation is antithetical to the rule of law and therefore *per se* "unreasonable, arbitrary or capricious" as a matter of procedural due process. As Justice Powell emphasized in *Mathews v. Eldridge*, 424 U.S. 319 (1976), "[t]he essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'" 424 U.S. at 348 (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)). Retroactive legislation provides neither notice nor an opportunity "to meet it."

Amici dispute the Solicitor General's characterization of the Ninth Circuit's holding as concocting a new economic strain of *substantive* due process.[7] The Ninth Circuit's opinion focused on *procedural* not substantive issues, foremost of which is notice. *Carlton*, 972 F.2d at 1059 (first of two "paramount" circumstances is whether the taxpayer had "actual or constructive notice that the tax statute would be retroactively amended"); *see United States v. Hemme*, 476 U.S. at 569 ("One of the relevant circumstances is whether, without notice, a statute gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute."); *see generally McNabb v. United States*, 318 U.S. 332, 347 ("The history of liberty has largely been the history of observance of procedural safeguards."), *reh'g denied*, 319 U.S. 784 (1943).

The procedural nature of constraints on retroactive lawmaking, whether criminal or civil, is made clear by Blackstone's famous exposition on "The Nature of Laws in General," wherein he discusses the several properties of "municipal or civil law," as distinguished from "the law of nature, the revealed law, and the law of nations":

> [Municipal or civil law] is likewise "a rule *prescribed*." Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution

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[7] The Solicitor General begins both the "Reasons for Granting Petition" section of the United States' Petition for Certiorari and the "Argument" section of the merits brief with the following sentence: "The decision of the court of appeals adopts and applies a novel and erroneous three-step substantive due process test for determining the constitutionality of retroactive tax legislation." United States Cert. Petition at 10; United States Brief at 12.

be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. . . . Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them up upon high pillars, the more effectively to ensnare the people. There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when *after* an action is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it; here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term "*prescribed*."

W. Blackstone, 1 *Commentaries on the Laws of England* --45-46 (1765) (emphasis in original).[8]

Because this case presents a *procedural* conflict between individual rights and expectations on the one hand

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[8] *See Dash v. Van Kleeck*, 7 Johns. 477, 495 (N.Y. Sup. Ct. 1811) (Thompson, J.) ("After referring to the unjust and iniquitous practice of the *Roman* emperor, (*Caligula*), as to the manner of writing and publishing his laws, [Blackstone] observes, that there is still a *more unreasonable* method than this, which is called making laws *ex post facto*. Although, technically speaking, the term *ex post facto* may be applicable only to laws punishing criminal offenses, the principle is equally applicable to civil cases." (Emphasis in original)); *see generally Reno v. Flores*, ___ U.S. ___, ___, 113 S. Ct. 1439, 1455 (1993) (O'Connor, J., concurring) ("procedural due process protections" include "notice of charges").

and the federal government's desire to raise more revenues on the other, it fits squarely within the "principal function of the Due Process Clause." *McGautha v. California*, 402 U.S. 183, 254 (1971) (Brennan, J., dissenting, joined by Douglas and Marshall, JJ.) ("The principal function of the Due Process Clause is to ensure that state power is exercised only pursuant to procedures adequate to vindicate individual rights."), *vacated sub nom. Crampton v. Ohio*, 408 U.S. 941 (1972). If ever there was a fundamental civil right, albeit procedural, that is both "deeply rooted in this Nation's history and tradition," *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J.), and "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), it is the right to be free from retroactive governmental deprivations of personal property, such as the retroactive taxation imposed upon Carlton first by the IRS and then sanctioned by the Congress.

In explaining its due process holding, the Ninth Circuit emphasized that "[f]ederal courts have long been hostile to legislation that interferes with settled expectations." 972 F.2d at 1057 (citation omitted). This historic hostility towards "legislation that interferes with settled expectations" -- a common thread between due process and *ex post facto* restrictions on governmental power -- is not restricted to federal courts, but is prevalent as well among the historic writings that most influenced the framers and ratifiers of the United States Constitution.

As retroactivity in tax legislation eviscerates all other procedural protections, *amici* urge the Court to adopt a bright-line test that will prevent retroactive application of any federal tax law to completed transactions and will otherwise safeguard individual rights by creating a presumption of unconstitutionality unless the retroactive application of a new tax law is necessary for the achievement of a compelling legislative purpose independent of the desire to raise additional revenues.

b. *Ex post facto* clauses

Article I, section 9 of the U.S. Constitution, concerning restraints on Congress, states that "[n]o Bill of Attainder or *ex post facto* Law shall be passed." In a similar manner, article I, section 10 states that "[n]o State shall . . . pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts." Practically all of this Court's caselaw examining and construing the term "*ex post facto*" involves the latter, and not the former. *See Collins v. Youngblood*, ___ U.S. ___, ___, 110 S. Ct. 2715, 2718-20 (1990) (Rehnquist, C.J., reviewing the litany of cases since *Calder v. Bull* that have restricted the term "to penal statutes which disadvantage the offender affected by them"). The Court's few cases involving the federal *ex post facto* prohibition typically cite *Calder v. Bull* (construing the state *ex post facto* prohibition) or other authorities stemming therefrom.[9]

The Court apparently has never before been faced with a federal *ex post facto* case that hearkened back to the distinguishing factors expounded by Justices Iredell and Paterson in *Calder v. Bull*, mentioned *supra* and discussed more fully *infra*. The Court's caselaw, however, has never fully closed the door on the obvious distinctions between federal and state *ex post facto* restrictions. For instance, Chief Justice Rehnquist's opinion in *Collins* suggests, at least implicitly, that the restrictive interpretation stemming from *Calder v. Bull* is limited to the state *ex post facto* clause. *See* ___ U.S. at ___, 110 S. Ct. at 2719 n.2 ("the Court has consistently adhered to the view expressed by Justices Chase, Paterson, and Iredell in *Calder* that the *Ex Post Facto* Clause applies only to penal statutes.").

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[9] *See, e.g., Kaiser Aluminum & Chemical Co. v. Bonjorno*, 494 U.S. 827, 855-56 (1990) (Scalia, J., concurring); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594-95 (Jackson, J.), *reh'g denied*, 343 U.S. 936 (1952); *Mahler v. Eby*, 264 U.S. 32, 39 (1924) (Taft, C.J.); *Johannessen v. United States*, 225 U.S. 227, 242 (1912) (Pitney, J.).

In any case, while the contexts of the respective *ex post facto* prohibitions are quite distinguishable (see discussion of structural indicia, *infra*), they both evince a firm belief that retroactivity -- which results in the unsettling of established rights and/or expectations -- is inherently pernicious. Confirming this belief, James Madison wrote that "*ex-post-facto* laws, and laws impairing the obligation of contracts are contrary to the first principles of the social compact, and to every principle of sound legislation." *The Federalist* No. 44, at 128 (R. Fairfield 2d ed. 1966). The Congressional Research Service recognizes the historical legitimacy of arguments that the *ex post facto* clauses should apply to all legislation: "At the time the Constitution was adopted, many persons understood the terms *ex post facto* laws to 'embrace all retrospective laws, or laws governing or controlling past transactions, whether . . . of a civil or a criminal nature.'" Congressional Research Service, *The Constitution of the United States: Analysis and Interpretation*, S. Doc. No. 16, 99th Cong., 1st. Sess. 381-82 (1987) (quoting 3 J. Story, *Commentaries on the Constitution of the United States* § 1339 (Boston: 1833)).

Supporting the then-popular sentiment that retroactive criminal and civil laws were seen in the same light, the New Hampshire Constitution of 1784 warns that "[r]etroactive laws are highly injurious, oppressive, and unjust. No such law, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." N.H. Const. of 1784, Part 1, § 23.

It is clear from the writings of Thomas Jefferson that the framers' abhorrence of *ex post facto* laws applied to all federal laws, whether civil or criminal. In 1813, for example (even after *Calder v. Bull*), Jefferson wrote of the retroactive application of a congressional patent law:

> Every man should be protected in his lawful acts, and be certain that no *ex post facto* law shall punish or endamage him for them. . . . The

> sentiment that *ex post facto* laws are against natural right, is so strong in the United States, that few, if any, of the State constitutions have failed to proscribe them. . . . [T]hey are equally unjust in civil as in criminal cases, and the omission of a caution which would have been right, does not justify the doing of what is wrong.

T. Jefferson, Letter to Isaac McPherson, Aug. 13, 1813, in 8 *The Writings of Thomas Jefferson* 326-27 (A. Bergh ed. 1903).

Likewise, Chancellor Kent of New York, while acknowledging the holding in *Calder v. Bull*, wrote that "there is no distinction in principle, nor any recognized in practice, between a law punishing a person criminally, for a past innocent act, or punishing him civilly by divesting him of a lawfully acquired right. The distinction consists only in the degree of the oppression, and history teaches us that the government which can deliberately violate the one right soon ceases to regard the other." *Dash v. Van Kleeck*, 7 Johns. 477, 506 (N.Y. Sup. Ct. 1811); *see* 7 Johns. at 503-04 (referring to intentionally retroactive laws as "pernicious" and "repugnant to common justice").

Notwithstanding *Calder v. Bull* and its legal progeny, a number of prominent jurists and scholars in this Century have insisted that the *ex post facto* clauses should apply in the civil context. *See, e.g., Lehmann v. United States ex rel. Carson*, 353 U.S. 685, 690 (Black and Douglas, JJ., concurring in the result), *reh'g denied*, 354 U.S. 944 (1957); *Marcello v. Bonds*, 349 U.S. 302, 319 (Douglas, J., dissenting), *reh'g denied*, 350 U.S. 856 (1955); *see generally* Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 Chi. L. Rev. 539 (1947) (citing original historical sources).

In a few cases since *Calder v. Bull*, the Court has even suggested that certain new civil laws, if applied retroactively, could be *per se* unconstitutional. For example, in *Herrick v. Boquillas Land & Cattle Co.*, 200

U.S. 96 (1906), this Court affirmed the Arizona Supreme Court's analysis that "if construed as absolutely barring causes of action existing at the time of its passage [a new statue of limitation] was unconstitutional." 200 U.S. at 102 (agreeing with Arizona Supreme Court -- citing *Sohn v. Watersohn*, 84 U.S. (17 Wall.) 596 (1873)). In 1927 this Court struck down a retroactive application of a federal estate tax as unconstitutional. *Nichols v. Coolidge*, 274 U.S. 531 (1927). Other cases have held that retroactively-imposed tax laws can be "confiscation of property in violation of due process of law." Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 796 (1936) (reviewing other cases; citations omitted).

Amici believe that retroactive taxation, especially as applied to completed transactions, is inherently unreasonable. More importantly, the *due process and ex post facto* clauses, together with contemporaneous historical indicia, demonstrate that the framers and ratifiers of the United States Constitution shared this belief.

2. *Structural indicia*

a. **Retroactive tax laws violate the rule of law underpinnings of the Constitution.**

Earlier this Century, the classical liberal scholar Friedrich von Hayek described the Rule of Law, with its inherent restriction on retroactive legislation, as the singlemost distinguishing factor of a free society: "Rule of Law . . . means that the government in all its actions is bound by rules fixed and announced beforehand -- rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge." F. von Hayek, *The Road to Serfdom* 72 (1944).

That a general prohibition against retroactive lawmaking is deeply rooted in Anglo/American jurisprudence cannot be disputed. Blackstone argued that "laws should not be enforced before the subjects have an opportunity to become acquainted with them." Smead, *supra*, at 777. James Madison justified restrictions on retroactive laws in the United States Constitution on the grounds that such restrictions "will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society." *The Federalist* No. 44, at 128-29 (R. Fairfield 2d ed. 1966).

Other contemporaneous legal authorities who influenced the framers and ratifiers of the United States Constitution agreed generally that the type of retroactivity in this case is inherently contrary to the rule of law. For example, Professor Burlamaqui wrote: "It is necessary that the laws be sufficiently notified to the subject; for how could he regulate his actions and motions by those laws, if he had never any knowledge of them?" J. Burlamaqui, *The Principles of Natural Law* 104 (Nugent trans. 3d ed. 1780); *see* J. Burlamaqui, 2 *The Principles of Natural and Politic Law* 154 (Nugent trans. 3d ed. 1784) ("The establishment of civil society ought to be fixed, so as to make a sure and undoubted provision for the happiness and tranquillity of man. For this purpose it was necessary to establish a constant order, and this could only be done by fixed and determinate laws.").

More specifically to the facts of this case, the inherent injustice of a retroactive estate tax law is highlighted by the following example in Baron von Pufendorf's Seventeenth Century treatise *On the Law of Nature and Nations*:

> [A]n accurate distinction should be drawn between the positive law itself, and that right the acquisition of which is occasioned by that law. The former may be annulled afterwards by the legislator, but the right still remains, which was acquired by virtue of that law, so long as it was

> in force. For it would be the height of injustice to abolish along with a law all of its former effects. If, for example, it should be the law of a state, that, *As the head of a house may have disposed of his property by testament, so let the right to it stand*, certainly a legislator will be able to limit this freedom of testament, and to ordain that hereafter all inheritances shall be returned intestate. But it would be unjust to take away all property received by inheritance from those who received legacies while the former law was still in force.

1 Pufendorf, Ch. 6, § 6 (emphasis in original; citations omitted).

Amici respectfully suggest that this and other historical insights into the injustice of retroactive estate taxes are instructive as to how the framers and ratifiers of the United States Constitution would have viewed the type of retroactive federal tax law at issue in this case.

b. As applied to past transactions, retroactive federal laws are judicial in nature, and therefore violate the separation of powers doctrine

In *Calder v. Bull*, Justice Iredell suggested that the Connecticut legislature's exercise of *judicial* power in the form of purely retroactive legislation was "strange," implying that the federal Congress, due to separation of powers principles, could not even countenance the idea:

> It may, indeed, appear strange to some of us, that in any form there should exist a power to grant, with respect to suits depending or adjudged, new rights of trial, new privileges of proceeding, not previously recognized and regulated by positive institutions; but such is the established usage of Connecticut, and it is obviously consistent with the general superintending authority of her

> Legislature. . . . The power, however, is judicial in its nature; and whenever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative, authority.

3 U.S. (3 Dall.) at 398 (Iredell, J., concurring "in the general result," dissenting in part due to "the reasons that are assigned").

Chancellor Kent of New York, author of *Commentaries on American Law* (9th ed. 1858), while acknowledging the holding in *Calder v. Bull* in *Dash v. Van Kleeck*, *supra*, expounded on the judicial nature of retroactive legislation:

> It is equally inadmissible to consider [a legislative] act as declaring how the former statutes were to be *construed*, as to cases already existing. If this interpretation was to be considered as giving the former acts a new meaning, it then becomes a new rule, and is to have the same effect, as any other newly created statute. But if it be considered as an exposition of the former acts for the information and government of the courts in the decision of causes before them, it would then be taking cognisance of a judicial question. This could not *possibly* have been the meaning of the act, for the power that makes is not the power to construe a law. It is a well settled axiom that the union of these two powers is tyranny. . . . Our government . . . consists of departments, and contains a marked separation of the legislative and judicial powers. . . . [T]he right to interpret laws does, and ought to belong exclusively to the courts of justice.

7 Johns. at 508-09 (emphasis in original).

Professor Story later justified the result in *Calder v. Bull* on grounds clearly distinguishable from federal legislation: "There is nothing in the Constitution of the

United States which forbids a State legislature from exercising judicial functions; nor from divesting rights vested by law in an individual, provided its effect be not to impair the obligation of a contract." J. Story, 2 *Commentaries on the Constitution of the United States* 272 (5th ed. 1891).

Justice Scalia more recently opined that retroactivity, while appropriate for judicial decisions, is constitutionally problematic for legislation generally: "[I]t is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases." *Harper v. Virginia Dep't of Taxation*, __ U.S. __ , 61 U.S.L.W. 4664, 4669 (June 18, 1993) (Scalia, J., concurring) (quoting T. Cooley, *Constitutional Limitations* 91 (1868)).[10]

To the extent the 1987 amendment to the Tax Reform Act of 1986 is what the Committee Report purports, *i.e.*, a conforming amendment to bring the Tax Reform Act of 1986 in line with "the original intent of Congress." H.R.Rep. No. 100-391, 100th Cong., 1st Sess., Pt. II, at 1045 (1987), the 1987 amendment, as applied to this case, is judicial in nature and therefore contrary to the separation of powers doctrine.

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[10] *See* Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 Ky. L.J. 323, 327-33 (1993) (discussing historical bases for *ex post facto* restrictions vis-à-vis separation of powers); *see generally* Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable*, 60 Tex. L. Rev. 875, 878 (1982) ("the due process clauses look to legislatures only for substantive entitlements, and . . . the clauses commit minimum procedural rights to the Constitution and therefore to the Court"), *citing* Michelman, *Formal and Associational Aims in Procedural Due Process*, in Nomos XVIII: Due Process 126, 133-34, 158-59 n.27 (J.R. Pennock and J. Chapman eds. 1977).

c. Federal legislative power does not extend between Congresses

Article 1, Section 1 vests all "legislative powers . . . in a Congress of the United States, which shall consist of a Senate and a House of Representatives." Every two years a new Congress is formed, and this Court has observed that the views of one Congress about the intent of a prior enacting Congress are entitled to little deference. *See United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 34 (1982); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 n. 39 (1977); *see also United Airlines v. McMann*, 434 U.S. 192, 200 n.7 (1977) ("Legislative observations 10 years after the passage of the Act are in no sense part of the legislative history.").

In September of 1986 the 99th Congress enacted an estate tax deduction for sales of employer securities to ESOP's within the Tax Reform Act of 1986, after which it adjourned. More than a year later, the newly elected and substantially transformed 100th Congress enacted another law, labeled a "Congressional Clarification of Estate Tax Deduction for Sales of Employer Securities," which purported to conform the Tax Reform Act of 1986 to "the original intent of Congress." H.R.Rep. No. 100-391, 100th Cong., 1st Sess., Pt. II, at 1045 (quoted at *Carlton*, 972 F.2d at 1054-55). But one Congress cannot definitely speak for the intent of another, for such would be an usurpation of judicial power. *Cf. James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, ___, 111 S. Ct. 2439, 2450-51 (Scalia, J., joined by Marshall and Blackmun, JJ.) (discussing judicial retroactivity vis-à-vis the division of federal powers).

The limitation in Article 1, Section 1 of "all legislative power" to "a Congress" suggests that the legislative power does not extend between Congresses. Accordingly, once a Congress has adjourned, that Congress' intent cannot be reconsidered by a subsequent Congress, especially as to cases and controversies wherein individuals have relied upon a law enacted by the prior Congress. As Chief

Justice Marshall admonished in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), "if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power." 10 U.S. (6 Cranch) at 135 (discussing contract clause restrictions on state governments).

Because Carlton's transaction was completed under section 2057, as enacted by the 99th Congress, the 1987 amendment by the 100th Congress "cannot undo it." *Id.*

d. The federal *ex post facto* clause should be construed broadly for a government of limited powers

To the extent a power to enact retroactive legislation turns on presumptions (such as the presumption that the founders intended the term "*ex post facto*" to apply only to criminal statutes), any such presumptions should take into consideration the fundamentally different natures of state versus federal governmental powers in the United States.[11] As the Court clarified in *Butler*:

> Each state has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the

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[11] *See* T. Cooley, *Constitutional Limitations* 173 (1868) ("The government of the United States is one of *enumerated* powers; the governments of the States are possessed of all the general powers of legislation. When a law of Congress is assailed as void, we look in the national Constitution to see if the grant of specified powers is broad enough to embrace it; but when a State law is attacked on the same ground, it is presumably valid in any case, and this presumption is a conclusive one, unless in the Constitution of the United States or of the State we are able to discover that it is prohibited. . . . Congress can pass no laws but such as the Constitution authorizes either expressly or by clear implication; while the State legislature has jurisdiction of all subjects on which its legislation is not prohibited."). Accordingly, a state government may be presumed to have a power to enact retroactive civil laws while the federal government is presumed not to have such power.

> states, or reserved to themselves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted. In this respect we differ radically from nations where all legislative power, without restriction or limitation, is vested in a parliament or other legislative body subject to no restrictions except the discretion of its members.

297 U.S. at 63.

The power of Congress to tax *retroactively* is neither enumerated nor "reasonably to be implied from those granted." 297 U.S. at 63. As the Court concluded in *Butler*, "the only thing granted [in art. I, § 8, cl. 1] is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare." 297 U.S. at 64; *see* 297 U.S. at 69-70 ("It would undoubtedly be an abuse of the [taxing] power . . . if exercised for ends inconsistent with the limited grants of power in the Constitution."), *quoting Veazie Bank v. Fenno*, 8 Wall. 533, 541 (1868). The Solicitor General would extend this limited power to include the power retroactively to amend "revenue laws to fairly allocate to taxpayers the burdens and benefits of national fiscal policies and to prevent evasion of those laws 'by the vigilant and ingenious.'" United States Brief at 15. Such an extension of non-enumerated power to Congress, to use the Solicitor General's own words (United States Brief at 19), "lacks a foundation" in either the text or the structure of the United States Constitution.

CONCLUSION

Amici urge the Court to affirm the Ninth Circuit's due process holding, and in so doing to provide a "bright line" constitutional test for retroactive federal tax legislation based on the constitutional guarantee of procedural due process, as well as on the other textual and structural indicia of intent by the framers and ratifiers of the

Constitution to protect individuals from a federal law that would tax, or increase net taxes on, past activities. The Constitution prohibits retroactive application of federal tax laws as to completed transactions and prohibits retroactive application generally unless necessary to achieve a compelling legislative purpose independent of the desire to raise additional revenues.

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